FILED

961772 MAY 6 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEPHEN FLICK,

Petitioner,

vs.

WEDDINGTON PRODUCTIONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Does the Copyright Act, 17 U.S.C. §301, preempt a state court's subject matter jurisdiction to preliminarily enjoin and punish, as a contempt of court, in the course of adjudicating state law property rights, the reproduction of copyrightable subject matter (here, sound effects used in the motion picture "Twister")?

2. What is the legal standard under the preemption provision of the Copyright Act, 17 U.S.C. §301, to be used in determining whether section 301 deprives a state court of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

The parties are Stephen Flick, Steve Flick's Creative Cafe, a California corporation, Dean Beville and Weddington Productions, Inc, a California corporation. Pursuant to Supreme Court Rule 29.6, the corporate parties have no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

ORDERS BELOW

The Order of the Superior Court of the State of California for the County of Los Angeles adjudicating Stephen Flick in contempt of court is reprinted at Appendix A. The Order of the Court of Appeal of the State of California, Second Appellate District, Division 2 denying the Petition for Writ of Habeas Corpus, etc. is reprinted at Appendix B. The Order of the Supreme Court of the State of California denying review is reprinted at Appendix C.

JURISDICTION

The Order of the Los Angeles Superior Court adjudicating petitioner in contempt of court for violation of a preliminary injunction was issued on November 26, 1996. On January 3, 1997, the Court of Appeal of the State of California, Second Appellate District, Division Two, denied petitioner's Petition for Writ of Habeas Corpus - Mandate - Prohibition. On February 5, 1997, the Supreme Court of California denied petitioner's Petition for Review.

This Petition for Certiorari is filed within ninety days of the entry of the California Supreme Court's Order denying review, as provided by 28 U.S.C. §2101(c) and United States Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States, Article I, Section 8 provides, in pertinent part:

> The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

The Constitution of the United States, Article VI, Clause 1 provides, in pertinent part:

> This Constitution and the Laws of United States, which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

United States Code, Title 28, Section 1338 provides, in pertinent part:

> (a) The District Court shall have original jurisdiction of any civil action arising under any Act of Congress relating to ... copyrights .... Such jurisdiction shall be exclusive of the courts of the states in ... copyright cases.

The Copyright Act, United States Code, Title 17, Section 301 provides, in pertinent part, as follows:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

STATEMENT OF THE CASE

Petitioner Stephen Flick is a highly regarded motion picture sound effects editor with more than twenty years of experience in his field. He has received two Academy Awards for "Best Sound Effects" and has been nominated to receive Academy Awards for his work on three other motion pictures.

Petitioner was a founding shareholder of respondent Weddington Productions, Inc. ("Weddington") which was formed to continue providing the motion picture sound effects editing services previously provided by petitioner and the other shareholders of Weddington. In the course of rendering services as a sound effects editor over the years, petitioner and the other shareholders of Weddington developed and repeatedly used a library of sound effects.

In 1995, petitioner and the other shareholders of Weddington fell into dispute and, thereafter, separately conducted their businesses of rendering sound effects editing services. On December 13, 1995, Weddington filed in the Los Angeles Superior Court a Verified Complaint for Breach of Fiduciary Duty, Claim and Delivery, Conversion, Unfair Competition, Interference With Prospective Economic Relationship, Accounting, Common Counts and Injunctive Relief. No claim for copyright infringement was alleged. On January 12, 1996, petitioner filed his answer to the complaint.

Thereafter, Weddington moved for a preliminary injunction to enjoin petitioner's continued use of the sound effects library. The Los Angeles Superior Court granted that motion and, on January 29, 1996, entered the preliminary injunction (the "Injunction") which formed the subject matter of the subsequent contempt proceeding and lies at the heart of this petition.[1] The Injunction provides, in pertinent part, as follows:

> **B. Injunction**
>
> 1. Defendants, Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives shall be and hereby are enjoined and restrained, during the pendency of this action, from engaging in, committing or performing directly any and all of the

---

[1] The Injunction is reprinted at Appendix D.

following acts:

> (a) Utilizing the Library for any information contained therein; ...

The "Library" was defined in the Injunction as consisting of the various tangible media or personal property in which copyrightable sound effects were embodied:[2]

> For purposes of this Preliminary Injunction, the Sound Effects Library of Weddington (the "Library") include the following:
>
> (a) The digital master tape and other media (collectively "the Master Tape") on which the Library is stored;
>
> (b) The computer data base including the relational data base program and

---

[2] Petitioner does not contend that the Los Angeles Superior Court lacked subject matter jurisdiction to enjoin disposition of the tangible personal property of which the Library consisted, as opposed to enjoining exercise of the specific rights of a copyright proprietor under 17 U.S.C. §106 as to copyrightable subject matter. Title 17, United States Code, section 202 provides, in pertinent part: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."

attendant data files that are used for searching, cataloguing and organizing the sound effects;

(c) The computer catalogue collection of master audio recordings;

(d) The physical media on which the master sounds are recorded and stored consisting primarily of digital audio tape ("DAT");

(e) All versions of the current sound recording media including DAT, ¼" reel to reel tape, 35mm magnetic rolls, 8mm Exabite tape, 2" 24 track analog tape, cassette tape, and all other forms of sound recording media;

(f) all copies of each of the foregoing;

(g) all storage cabinets for each of the foregoing.

In May of 1996, the Los Angeles Superior Court issued an Order to Show Cause Re Contempt against petitioner and the other defendants based upon Weddington's showing that Petitioner had reproduced certain sound effects in the Library. In June of 1996, the evidentiary phase of the contempt trial was held, although closing briefs were not then submitted.

At the trial, Weddington's only proof was that

Petitioner reproduced the sound effects in the Library and created derivative works based thereon while rendering his services as the supervising sound effects editor on the theatrical motion picture, "Twister". Such conduct constitutes exercise of the exclusive rights of a copyright proprietor under 17 U.S.C. §106 as to copyrightable subject matter.

After the evidentiary phase was completed, the contempt trial was abated to allow the parties to mediate and, thereafter, reinstated by the Court. The parties then filed their closing briefs in connection with the contempt trial.

On November 26, 1996, the Los Angeles Superior Court issued its Minute Order and Order holding petitioner in contempt of court for violating Paragraph B.1(a) of the Injunction. That order contained no preemption analysis at all; the Los Angeles Superior Court offered only its conclusion that the state court contempt proceeding was not "precluded or preempted".

In pertinent part, the Los Angeles Superior Court's Order stated as follows:

> ... Nor does the injunction "adjudicate" rights of a copyright proprietor (ref. Opposition Brief, p. 10, 11, 12-23).
>
> There is no "exclusive federal jurisdiction" over this proceeding. The Federal Copyright Act does not preclude or preempt this state court contempt proceeding.

> The evidence has shown beyond a reasonable doubt that Stephen Flick at all times had the ability to comply with the order but nevertheless utilized the subject Sound Library on the movie "Twister" on sixteen occasions during March 24 and 28, 1996, and that the use was intentional and willful.

If, as Petitioner contends, the Los Angeles Superior Court was without subject matter jurisdiction to issue or to enforce the Injunction, the contempt adjudication must be reversed, as this Court held in *In re Green's Petition*, 369 U.S. 689, 82 S.Ct. 1114, 8 L.Ed.2d 198 (1962):

> For, as *Amalgamated Association of St. Elec. Ry. & Motor Coach, etc. v. Wisconsin Employment Relations Board, supra*, held, a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption. 396 U.S. at 692, 82 S.Ct. at 1117.

Petitioner Stephen Flick was sentenced on December 23, 1996 by the Los Angeles Superior Court to pay a fine of $16,000 and later was ordered to pay attorneys' fees of $15,000 incurred by Weddington in connection with the contempt proceedings.

Petitioner sought relief from the Court of Appeal of the State of California, Second Appellate District, Division Two, by way of Petition for Writ of Habeas Corpus, etc. Upon the denial of that Petition, petitioner sought relief from the Supreme Court of the State of California by way

of Petition for Review After Denial of Petition for Writ of Habeas Corpus, etc. That Petition, too, was denied.

THE STAGE OF PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS FIRST RAISED

Petitioner first raised the federal question as to the Los Angeles Superior Court's lack of subject matter jurisdiction to issue or to enforce the Injunction by way of Motion to Dissolve and/or Modify Injunction, filed November 8, 1996, after the contempt proceedings had been reinstated by the Los Angeles Superior Court on October 17, 1996. Petitioner continued to raise the issue in his Brief of Stephen Flick and Steve Flick's Creative Cafe in Opposition to Contempt Proceedings, filed in the Los Angeles Superior Court on November 14, 1996 as part of the final briefing in connection with the contempt trial. Thereafter, petitioner raised this issue in the California Court of Appeal and California Supreme Court, as his primary argument.

REASONS FOR GRANTING THE WRIT

I.

THE VARIOUS STATE AND FEDERAL COURTS ARE USING DIFFERENT LEGAL STANDARDS TO DETERMINE WHETHER STATE LAW CLAIMS ARE PREEMPTED UNDER THE COPYRIGHT ACT AND REACHING INCONSISTENT RESULTS

Both state courts and federal courts are called upon to determine whether claims have been preempted by the Copyright Act, 17 U.S.C. §301. While the Los Angeles Superior Court here completely failed to articulate the standard it used to find that its own jurisdiction was not preempted, other courts have articulated different standards to determine whether preemption is appropriate and have produced conflicting results.

For example, in *Wolff v. Institute of Elec. & Eng.*, 768 F.Supp. 66 (S.D.N.Y. 1991), a photographer brought suit against a magazine alleging both copyright infringement and breach of contract. The breach of contract claim was based upon a breach of provision for one-time use of a photograph in the contract between the parties by defendants' subsequent use of the subject photograph. The United States District Court for the Southern District of New York used the following standard in holding that the cause of action for breach of contract was preempted by 17 U.S.C. §301 of the Copyright Act:

> State causes of action are "equivalent" to the exclusive rights within copyright law, and accordingly pre-empted by that statute,

> unless they are "qualitatively different" from the rights granted under the Copyright Act. (citations) In the case at bar, IEEE [defendant] breached its contract with plaintiffs, embodied in the stock photo invoice, by infringing plaintiffs' copyright. It is difficult to see how the resulting claims are qualitatively different. Accordingly the breach of contract claim is pre-empted. 786 F.Supp. at 69.

In *National Car Rental v. Computer Associates*, 991 F.2d 426 (8th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 176, 126 L.Ed.2d 136 (1993), the Court of Appeals reversed the trial court's finding that a cause of action for breach of contract had been preempted by the Copyright Act. The gravaman of the appellant licensor's claim in *National Car Rental* was that the appellee licensee of computer software had used the software to render services to third parties, in violation of a contractual provision limiting use of the software to services for the licensor. The Court of Appeals for the Eighth Circuit relied upon what is sometimes referred to as the "extra element" test in finding that the state law contract claim was not preempted:

> Absent the parties' agreement, this restriction would not exist. Thus, C.A. [licensor] is alleging that the contract creates a right not existing under the copyright law, a right based upon National's promise, and that it is suing to protect that contractual right. The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively

> different from one for copyright. 991 F.2d at 433.

As a matter of logic, the existence of a contractual promise will always constitute an "extra element", extraneous to the elements of a claim for copyright infringement. Moreover, even where the "extra element" test is applied, applications vary and the existence of "extra elements" is only sometimes sufficient to preserve a state court claim from preemption.

In *Acuff-Rose Music, Inc. v. Campbell*, 754 F.Supp. 1150 (M.D. Tenn. 1991), *rev'd on other grounds*, 972 F.2d 1429 (6th Cir. 1992), *rev'd on other grounds*, 510 U.S. 569, 114 S.Ct. 1164 127 L.Ed.2d 500 (1994), the copyright proprietor of a song sued a rap group for copyright infringement and interference with prospective business advantage based upon the rap group's use of a portion of the song. Although the district court found that "[t]o prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive" - all elements unnecessary to a claim for copyright infringement and therefore "extra", the court nevertheless held the claim for interference to be preempted:

> In addition, the fact that a state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:
>
> > [T]he fact that cross-appellants pleaded additional elements of awareness and

> intentional interference, not a part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by §106 the cause of action is pre-empted by federal law. 754 F.Supp. at 1160.

In *Data General v. Grumman Systems Support Corp.*, 795 F.Supp. 501 (D. Mass. 1992), *aff'd and rev'd, in part, on other grounds*, 36 F.3d 1147 (1st Cir. 1994), the court, in finding preemption of a state law claim for unjust enrichment, employed a two-step process:

> State claims are pre-empted if two conditions are met. (citations) First, the work of authorship in which rights are claimed must fall within the subject matter of copyright as defined by §§102 and 103. ...
>
> The second condition is that the state-created right must be equivalent to one of the exclusive rights created by the Copyright Act. 795 F.Supp. at 505.
>
> In determining "equivalency" under the second

condition, the *Data General* court recognized the "extra element" test but noted that even the presence of extra elements is not conclusive. The *Data General* court found that the plaintiff's claim for unjust enrichment, although containing "extra elements", was preempted.

> Count VI of the complaint alleges a claim for unjust enrichment. This claim is for damages for the alleged violation of Data General's exclusive right to control the use of the copyrighted materials, and is thus another repackaged allegation of copyright infringement. Such a claim is pre-empted by federal law. 506 F.Supp. at 795.

In contrast, in *Schuchart & Associates, etc. v. Solo Serve Corp.*, 540 F.Supp. 928 (W.D. Tex. 1982), the court found that the Copyright Act did not preempt the plaintiff's claim for unjust enrichment based upon the defendant's use of copyrighted architectural plans to create new plans for a similar building.

> The rights [under the unjust enrichment claim] plaintiffs seek to enforce are fundamentally different in kind from the exclusive rights in copyrighted works to reproduce a copyrighted work, to prepare a derivative work or to distribute copies of copyrighted work. Plaintiffs seek not to enforce their rights to copy and distribute their plans and drawings. Nor do plaintiffs seek to recover damages analogous to the actual damages provided by §504(b). Rather, Plaintiffs seek to recover under

> *quantum meruit* the value of the services rendered by defendants' use of the plans and specifications prepared by Plaintiff. ... Section 301 has not pre-empted Plaintiff's cause of action for unjust enrichment. 540 F.Supp. at 945.

II.

THIS COURT HAS NOT YET INTERPRETED THE PREEMPTION PROVISIONS OF THE COPYRIGHT ACT, 17 U.S.C. §301. IT SHOULD DO SO NOW.

In *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973), decided prior to the enactment of the Copyright Act of 1976, this Court upheld the validity of a California statute making it a criminal offense to "pirate" sound recordings. In doing so, this Court approved variation among the states in the quantum of protection afforded various works of authorship.

> Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded. ... In view of that enormous diversity, it is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects.

* * *

> ... We do not see here the type of prejudicial conflicts which would arise, for example, if each state exercised the sovereign power to impose imposts and tariffs; nor can we discern a need for uniformity such as that which may apply to the regulation of interstate shipments. 412 U.S. at 558-559, 93 S.Ct. at 2310-2311.

In 1989, in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), this Court briefly addressed the general subject matter of copyright preemption after the enactment of the Copyright Act in 1976. In interpreting the work for hire provisions of the Copyright Act, this Court recognized the profound impact which the enactment of Section 103 has had with respect to preemption.

> Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly preempting state statutory and common law copyright regulation. See, 17 U.S.C. §301(a). We thus agree with the court of appeals that the term "employee" should be understood in light of the general common law of agency. 490 U.S. at 740-741, 109 S.Ct. at 2173.

The "Act's express objective of creating national, uniform copyright law by broadly preempting state statutory and copyright regulation" similarly requires that each of the state and federal courts apply the same standard to deter-

mine whether the subject matter of the action before it has been preempted under 17 U.S.C. §301.

III.

RECENT TECHNOLOGICAL DEVELOPMENT, INCLUDING PUBLICATION ON THE INTERNET AND DESK TOP PUBLISHING, AUGMENT THE NEED FOR NATIONAL UNIFORMITY IN THE EXERCISE OF FEDERAL COPYRIGHT JURISDICTION.

In the years since *Goldstein* was decided in 1973, there has been massive proliferation of computers in American homes, small businesses and large businesses with the associated ability to publish, copy, download, upload, e-mail and post on the Internet copyrightable subject matter. That Americans are fully exploiting these possibilities of the computer age is beyond doubt. America Online, the largest of many providers of access to the Internet, has recently been forced to shut down in order to expand its capacity, as have many of the other providers of access to the Internet.

As a result of this expansion of publishing and communication, through the use of computers, it may be expected that civil actions with respect to use of copyrightable subject matter will arise throughout the United States and form the subject matter of litigation in both the federal and state courts. In fact, many such cases have already arisen.

Thus, not only has Congress now spoken as to the need for "creating national, uniform copyright law by broadly preempting state statutory and common law copyright regulations" since this Court's decision in *Goldstein* but also technological development has created an urgent need for a "uniform copyright law" throughout the 50 states. The first step in establishing such uniformity is application of a uniform test to determine whether state court jurisdiction has been preempted.

IV.

CONCLUSION

This Petition should be granted.

DATED: May 1, 1997

Respectfully submitted,

THOMAS DONIGER
Counsel of Record

DONIGER & FETTER

Attorneys for Petitioner
Stephen H. Flick

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Date:	11/26/96	**Dept.** 85
Honorable	Robert O'Brien	Judge
Honorable		Judge Pro Tem
	NONE	Deputy Sheriff
	DAROLYN JENSEN	Deputy Clerk
	NONE	Electronic Recording Monitor
		Reporter

BC140705

WEDDINGTON PRODUCTIONS, INC
VS
STEPHEN FLICK, ET AL
*SEE PROTECTIVE ORDER DTD. 5-14

r/t BC136515

Plaintiff Counsel — NO APPEARANCES
Defendant Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED ORDER TO SHOW CAUSE RE: CONTEMPT

The court finds Stephen Flick in contempt of court for violating Paragraph B.1.(a) on the 1/29/96 injunction order on sixteen counts as reflected in ORDER signed and filed this date.

Sentencing is set for 12/27/96 at 9:30 a.m. in Department 85; Stepehn (sic) Flick personally and all counsel are ordered to appear.

Copies of this minute order and above signed ORDER are sent by U.S. Mail this date addressed as follows:

DONIGER & FETTER
606 SO. OLIVE STREET, #530
LOS ANGELES, CA 90014

LEVY, SMALL & LALLAS
815 MORAGA DRIVE
LOS ANGELES, CA 90049-1633

MINUTES ENTERED
11 / 26 / 96
COUNTY CLERK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
Los Angeles Superior Court
NOV 26 1996
John A. Clarke, Clerk
/s/ Darolyn Jensen
By Darolyn Jensen, Deputy

WEDDINGTON PRODUCTIONS, INC.,
a California Corporation,
Plaintiff,

vs.

STEPHEN FLICK, etc., et al.,
Defendants.

Case No. BC 140 705

ORDER

The Court had for some time held the contempt proceedings in abeyance, because the parties were apparently close to settling the case. It was anticipated by the parties that if the case was settled, that they would then request the Court to abort these contempt proceedings. The Court was receptive to hearing and ruling on such a request. It appears that it is not settled and the contempt proceedings must be brought to closure.

The January 29, 1996 order is lawful, clear and unambiguous. Each alleged contemnor, Stephen Flick,

and Stephen Flick Creative Cafe, a purported corporation, had specific and direct knowledge of the injunction order.[1]

The responding parties raise an argument as to ownership of the Sound Library (see opposition, p. 12, 11. 3-9, p. 15, 11. 11-23). Even if that was an issue as to whether either of them violated the status quo injunction, it is too late now to raise the argument.

The Court does not herein decide formally whether either party owned the Sound Library or miappropriated (sic) it or other property. This proceeding is limited to whether the alleged contemnors violated the Court's January 29, 1996 order which was given to maintain the status quo while the lawsuit proceeded to completion. Certainly, there was insufficient evidence presented showing that Mr. Flick is the "copyright proprietor." Nor does the injunction "adjudicate" rights of a copyright proprietor (ref. Opposition brief, p. 10, ll. 12-23).

There is no "exclusive federal jurisdiction" over this proceeding. The Federal Copyright Act does not preclude or preempt this state court contempt proceeding.

The evidence is shown beyond a reasonable doubt that Stephen Flick[2] at all times had the ability to comply with the order but nevertheless utilized the subject Sound Library on the movie "Twister" on sixteen occa-

---

[1] Also, each alleged contemnor had direct and specific notice of the OSC re: contempt and supporting papers. Those documents were accepted for service by their attorney of record, Robert L. Becking. There was no evidence rebutting the presumption that they were not notified. See, *In re Sigesmund*, 193 Cal.App.2d 219; *People v. Sup.Ct.*, 230 Cal.App.2d 99. Indeed, no such defense was presented at the contempt trial.

[2] The evidence is unclear as to the distinction between Stephen Flick and Stephen Flick Cafe. Accordingly, the Court considers them one and the same.

sions during March 24 and 28, 1996, and that the use was intentional and willful. Stephen Flick had clear knowledge of the content of the Sound Library and its use. Contrary to the injunction, he willfully violated the injunction.[3]

The Court adjudges Stephen Flick in contempt of court for violating Paragraph B.1.(a) of the January 29, 1996 injunction order sixteen times, thus sixteen counts of contempt.

Stephen Flick is ordered to appear at 9:00 a.m. on December 27, 1996 in Department 85 for sentencing pursuant to Code of Civil Procedure section 1218 and Code of Civil Procedure section 1219. Further, at that time the Court will set the time and manner for determining moving party's request for attorney's fees and costs.

DATED: November 26, 1996

/s/ Robert H. O'Brien
Robert H. O'Brien
Judge of the Superior Court

RHO: dl
E0P45N21.6W1

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[3] The opposing brief refers to a "Declaration of Stephen Flick attached" (p. 10, l. 1). No such declaration is attached. Moreover, evidence relating to that reference would not be accepted at this time as too late. Any such relevant testimony should have been presented at the contempt trial.

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 01/03/97

Doniger & Fetter
Thomas Doniger
606 South Olive Street
Suite 530
Los Angeles, CA. 90014

RE: Flick, Stephen
VS.
S.c.l.a.
Weddington Productions Inc.
2 Criminal B108199
Los Angeles No. BC140705

THE COURT:

The petition for writ of Habeas-Mandate-Prohibition-Stay is denied.

APPENDIX C

2/2 No. B108199
S058416

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB 5 1997
Robert Wandruff Clerk

Deputy

STEPHEN FLICK,
Petitioner

v.

LOS ANGELES SUPERIOR COURT,
Respondent
WEDDINGTON PRODUCTIONS, INC.,
Real Party in Interest

Application for stay and petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

TOM LALLAS (SBN 66512)
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A Partnership Including Professional Corporations
815 Moraga Drive
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Telephone: (310) 471-3000

Attorneys for Plaintiff
Weddington Productions, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
Los Angeles Superior Court
JAN 29 1996
Clerk
/s/ T. Acuna
By T. Acuna Deputy

WEDDINGTON PRODUCTIONS, INC.,
a California Corporation,
Plaintiff,

v.

STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive,
Defendants.

CASE NO. BC 140 705

PRELIMINARY INJUNCTION

DATE: December 29, 1995
TIME: 9:30 a.m.
DEPT:

The Court having read the moving and opposing papers, the declarations and evidence submitted by the parties, and having heard the argument of counsel, and good cause appearing therefore:

IT IS HEREBY ORDERED THAT:

A. DEFINITIONS

For purposes of this Preliminary Injunction:

1. The term "Weddington" shall mean and include Weddington Productions, Inc.

2. The term "Flick" shall mean and include Stephen Flick.

3. The term "Creative Cafe" shall mean and include Steve Flick's Creative Cafe.

4. The term "Beville" shall mean and include Dean Beville.

5. The term "Weddington Customer Lists" shall mean and include any software, diskettes, other computer memory, rolodex files, computer printouts, address lists, documents copied, taken, or removed from Weddington and all other documents of any kind or nature whatsoever that in any way mention, relate to, or refer to any of the following with respect to Weddington's customers.

(a) ~~Customer names;~~ [(a-c) deleted by judge]

(b) ~~Customer addresses;~~

(c) ~~Customer telephone numbers;~~

(d) Notes about the customers;

(e) Information regarding the customers' requirements;

(f) What was discussed with the customer when the customer was contacted by Weddington; and

(g) The name of the individual(s) employed by the customer whom Weddington contacts in Weddington's dealings with the customer.

6. The term "Library" shall mean and include the sound effects library as defined by Exhibit "1" attached hereto and incorporated herein by reference as though set forth in full herein.

B. INJUNCTION

1. Defendants, Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives shall be and hereby are enjoined and restrained, during the pendency of this action, from engaging in, committing or performing directly any and all of the following acts:

(a) Utilizing the Library for any information contained therein;

(b) Utilizing any Weddington customer lists or any information contained therein;

(c) ~~Soliciting, contacting, or otherwise communicating with any customer of Weddington;~~

(d) ~~Providing sound production services to any customer of Weddington.~~ [(c) and (d) deleted by judge]

2. Defendants Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives are required to deliver to Weddingtoin within five days from the date hereof:

(a) All copies of the Library in their possession or under their control;

(b) All Weddington customer lists in their possession or under their control;

(c) All Weddington trade secrets in their possession or under their control;

3. The amount of the preliminary injunction bond to be ~~posted~~ filed in Dept. 58 by Weddington shall be $ 25,000 . [edited by judge]

DATED: JAN 20, 1996

/s/ ROBERT H. O'BRIEN
ROBERT H. O'BRIEN
Judge of the Superior Court

EXHIBIT 1

For purposes of this Preliminary Injunction, the Sound Effects Library of Weddington ("the Library") include the following:

(a) The digital master tape and other media (collectively "the Master Tape") on which the Library is stored;

(b) The computer data base including the relational data base program and attendant data files that are used for searching, cataloging and organizing the sound effects;

(c) The computer catalog collection of master audio recordings;

(d) The physical media on which the master sounds are recorded and stored consisting primarily of digital audio tape ("DAT");

(e) All versions of the current sound recording media including DAT, 1/4" reel to reel tape, 35mm magnetic rolls, 8mm exabite tape, 2" 24 track analog tape, cassette tape, and all other forms of sound recording media;

(f) All copies of each of the foregoing;

(g) All storage cabinets for each of the foregoing.

APPENDIX E

COPYRIGHT ACT OF 1976

17 U.S.C.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any States.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause

of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990:

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.